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Dec 6, 2006

No. 06-8273

In the
SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 2006

Stephen Danforth, *Petitioner,*

v.

State of Minnesota, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?
2. Did *Crawford v. Washington*, 541 U.S. 36 (2004), announce a "new rule of constitutional criminal procedure," as *Teague* defines that phrase and, if it did, was it a watershed rule of procedure subject to full retroactive application?

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen Danforth respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Minnesota Supreme Court appears at appendix A to this petition. The court's opinion is published at 718 N.W.2d 451 (Minn. 2006).

JURISDICTION

The Minnesota Supreme Court issued its decision on July 27, 2006. A copy is attached at appendix A. The Minnesota Supreme Court entered final judgment on the appeal on October 10, 2006. A copy of the judgment is attached at appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Stephen Danforth was convicted by a jury in Minneapolis, Hennepin County, Minnesota, of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (1994), on March 6, 1996. (App. A-1). The conviction arose out of the alleged sexual abuse of J.S., then a six-year-old boy. (*Id.*). The district court judge found that J.S. was incompetent to testify at petitioner's trial. In lieu of live testimony subject to cross-examination, therefore, the jury saw and heard a videotaped interview of J.S. conducted at a "non-profit center." (*Id.*). During the interview, J.S. accused petitioner of sexually abusing him. (App. C-3).[1]

[1] The Minnesota Court of Appeals' opinion in petitioner's direct appeal is published at 573 N.W.2d 369 (Minn. Ct. App. 1997), and is attached at appendix C.

Petitioner appealed his conviction. Among other claims, he argued that the admission of the videotape of J.S.'s statement violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. (App. C-6). The Minnesota Court of Appeals considered the issue under the balancing test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), along with *Idaho v. Wright*, 497 U.S. 805 (1990), and attendant Minnesota caselaw. (App. C-6-7). The Court of Appeals affirmed the admission of the tape and the conviction, holding that "the videotape was sufficiently reliable to be admitted into evidence." (*Id.*). The Minnesota Supreme Court denied review and, following an appeal after a resentencing, petitioner's case became final in 1999.[2]

In 2004, this Court released *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court "impose[d] an absolute bar to [the admission of] statements that are testimonial, absent a prior opportunity to cross-examine [the declarant]." *Crawford*, 541 U.S. at 62. Believing that the statement at issue in his case was testimonial and thus was admitted in violation of his right of confrontation, petitioner, acting pro se, filed a second petition for postconviction relief to challenge his conviction.[3] The district court denied the petition and the Minnesota Court of Appeals affirmed. *Danforth v. State*, 700

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[2] In late 2000, petitioner filed a petition for postconviction relief to challenge his conviction and sentence. The petition was denied and it is not at issue here. *See Danforth v. State*, 2000 WL 1780244 (Minn. Ct. App. 2000), *rev. denied* (Minn. Feb. 13, 2001) (attached in Appendix E).

[3] *See Deegan v. State*, 711 N.W.2d 89, 93-96 (Minn. 2006) (discussing Minnesota's Post-Conviction Relief Act); *See* Minn. Stat. § 590.01, *et seq.* (2004) (providing for petitions for postconviction relief).

N.W.2d 530 (Minn. Ct. App. 2005). Petitioner petitioned for further review, and the Minnesota Supreme Court granted the petition and assigned him counsel.[4]

Petitioner encouraged the Minnesota Supreme Court to consider the issue of *Crawford*'s application to his case under a standard different from the one used in federal court to determine whether new rules of constitutional criminal procedure apply retroactively to cases pending on federal habeas corpus review. (App. A-4); *see also Teague v. Lane*, 489 U.S. 288 (1988). Petitioner argued that because the Minnesota Supreme Court has the authority to offer its citizens greater protections under the state constitution than those offered by the federal constitution, the court could apply *Crawford* to a broader class of cases than the class required by *Teague*. In the alternative, petitioner argued that *Crawford* applied to his case under the *Teague* standard. (App. A-4-5).

The Minnesota Supreme Court disagreed with both arguments. The court held that petitioner "is incorrect when he asserts that state courts are free to give a [United States] Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court." (App. A-5). Citing two of this Court's decisions, *American Trucking Associations v. Smith*, 469 U.S. 167, 178 (1990) (plurality opinion), and *Michigan v. Payne*, 412 U.S. 47, 49 (1973), as authority, the Minnesota court held that it "cannot apply state retroactivity principles when

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[4] During the course of these proceedings, petitioner has had a federal habeas corpus challenge to his conviction pending. The district court denied the petition but granted petitioner a certificate of appealability to the United States Court of Appeals for the Eighth Circuit on the *Crawford* issue. *Danforth v. Crist*, 2005 WL 2105502 (D. Minn. Aug. 26, 2005). The undersigned does not represent petitioner in that process.

determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles." (App. A-5-6). The court recognized that several other state supreme courts had reached the opposite conclusion and noted that the policy concerns underlying *Teague* may not apply to state postconviction proceedings. (App. A-6-7). But ultimately, the court held that it was "not free to fashion [its] own standard of retroactivity for *Crawford*." (App. A-7).

Applying *Teague*, the Minnesota Supreme Court held that *Crawford* had announced a new rule of constitutional criminal procedure and that the rule was not a watershed rule. (App. A-7-14). Therefore, the court held that *Crawford* did not apply to petitioner's case. It affirmed the denial of his post-conviction petition. (App. A-14).

Petitioner now seeks a writ of certiorari from this Court on the two important questions presented in this case.

REASON FOR GRANTING THE PETITION

I.

THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER A STATE COURT MUST APPLY THE *TEAGUE* STANDARD WHEN DETERMINING THE RETROACTIVE EFFECT OF UNITED STATES SUPREME COURT DECISIONS, OR WHETHER STATE COURTS MAY USE A BROADER STANDARD FOR RETROACTIVE APPLICATION.

Deepening a split of authority in the state courts, the Minnesota Supreme Court held that it was absolutely prohibited from applying any test for retroactive application of new rules of federal constitutional criminal procedure other than the test announced in *Teague v. Lane*, 489 U.S. 288, 310 (1989). This Court should grant certiorari in this case because this important issue, a question of federal law, is subject to an intractable split of authority in the lower courts and it has not been, but should be, resolved by this Court. U.S. Sup. Ct. Rule 10.

A. The *Teague* Standard Is Based on Principles Unique to State Cases Being Considered Under Federal Habeas Corpus Review.

In *Teague v. Lane* and subsequent decisions, this Court announced and applied a test for determining whether the holding of one of this Court's cases could be applied retroactively to cases pending on federal habeas corpus review. This Court recently summarized the test as follows:

> Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually new. Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411 (2004) (citations omitted).

> In *Teague*, the Supreme Court, instead of focusing on the purpose and impact of a new constitutional rule, looked to the function of federal habeas review, which is to ensure that state courts conscientiously follow federal constitutional standards. The Court determined that this function is met by testing state convictions against the constitutional law recognized at the time of trial and direct appellate review,...[.] Therefore, once a conviction has become final, federal courts should generally not interfere with the state courts by applying new rules retroactively.

Colwell v. State, 59 P.3d 463, 470 (Nev. 2002) (citations omitted). The *Teague* Court based the test upon its conclusion that "the interests of comity and finality" precluded a federal court from altering a state court conviction based upon a newly announced rule of federal constitutional law. *Teague*, 489 U.S. at 308. The Court was also concerned with the "costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus." *Id.* at 310 (quotation omitted). Finally, the Court recognized that "'[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." *Id.* (quoting *Engle v. Isaac*, 456 U.S. 108, 128 n. 33 (1982)).

B. There is a split of authority over whether state courts are required to use the *Teague* standard or whether they are free to fashion their own broader test retroactive application of United States Supreme Court decisions.

Given that the reasons behind the *Teague* test apply primarily, if not exclusively, to federal habeas corpus cases, many state courts have declined to use the *Teague* standard and instead have considered the retroactive effect of this Court's holdings under their own, broader tests. *See Smart v. State*, ___ P.3d ___, 2006 WL 3042821 (Alaska

App. Oct. 27, 2006); *Hughes v. State*, 901 So.2d 837, 839-48 (Fla. 2004); *State v. Whitfield*, 107 S.W.3d 253, 266-68 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 470-71 (Nev. 2002), *cert. denied*, 540 U.S. 981 (2003); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296-97 (La. 1992), *cert. denied* 508 U.S. 962 (1993); *Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990); *Cowell v. Leapley*, 458 N.W.2d 514, 517-18 (S.D. 1990); *see also State v. Forbes*, 119 P.3d 144, 148-49 (N.M. 2005) (holding that *Crawford* did not announce a new rule but only as applied to defendant at issue, who had argued for *Crawford*'s definition of "testimonial" on direct appeal); Hon. Laura Denvir Stith, A Contrast of State and Federal Court Authority to Grant Habeas Relief, 38 Val. U. L. Rev. 421, 438-49 (2004) (arguing that states are free to use retroactivity standards other than *Teague* to afford retroactive application of United States Supreme Court decisions to boarder class of defendants). As authority for their holdings, many of those courts relied upon this Court's pre-*Teague* statement that states are "entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by" the Supreme Court's interpretation of the federal constitution.[5] *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

In addition, these courts rely upon the longstanding rule that state courts are permitted to interpret their state constitutions to provide greater freedoms to their citizens than those provided by the federal constitutions. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *see also Brigham City, Utah v. Stewart*, 547 U.S. ___, ___, 126 S.Ct. 1943,

[5] *See, e.g., Colwell*, 59 P.3d at 470-72; *State v. Fair*, 502 P.2d 1150, 1151 (Or. 1972), *overruled by Page v. Palmateer*, 84 P.3d 133, 138 (Or. 2002).

1950-51 (2006) (Stevens, J., concurring) (discussing state supreme court's authority to provide greater protections under state constitution than those afforded by federal constitution). Part of that freedom, the courts cited above have concluded, is the freedom to provide relief to a larger class of criminal defendants than that required by *Teague*. *See, e.g. Colwell*, 59 P.3d at 470 (rejecting *Teague* standard because "*Teague* is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions."); *State v. Fair*, 502 P.2d 1150, 1152 (Or. 1972) (holding that state courts "are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires"), *overruled by Page v. Palmateer*, 84 P.3d 133, 138 (Or. 2004), *cert. denied*, 543 U.S. 866 (2004).

Other state courts, now including the Minnesota Supreme Court, have concluded that they do not have the authority to use a broader test for retroactive application of this court's decisions. (App. A-5-7); *Page v. Palmateer*, 84 P.3d 133, 137-38 (Or. 2004); *State v. Egelhoff*, 900 P.2d 260, 267 (Mont. 1995). Those courts have relied upon this Court's decisions in *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), *Oregon v. Hass*, 420 U.S. 714, 719 (1975), and *Michigan v. Payne*, 412 U.S. 47 (1973), for the proposition that they "cannot apply state retroactivity principles when determining the retroactivity of a new rule of federal constitutional criminal procedure if the Supreme Court has already provided relevant federal principles." (App A-5-6); *see also Page*, 84 P.3d at 137-38 (distinguishing between rules of state and federal constitutional law and

holding that it was not "free to determine the degree to which a new rule of federal constitutional law should be applied retroactively"). These courts did not simply decide to apply the *Teague* standard as a matter of comity or policy.[6] Instead, they held that they were forced by this court's decisions to apply *Teague*. (App. A5-7); *Page*, 84 P.3d at 138.

The split of authority on this issue is large and intractable. The issue of whether a state court must use the *Teague* standard has been decided different ways by courts in no fewer than twelve states. Only the United States Supreme Court can resolve this issue. The question of whether state-courts are required to use the *Teague* standard to determine the retroactive effect of Supreme Court decisions in state courts is a question of federal law. *See American Trucking*, 496 U.S. at 177-78. But the lower federal courts are unlikely to be in a position to resolve this question, thanks to the numerous procedural and substantive barriers surrounding federal habeas corpus petitions. The most daunting such barrier is the requirement that any state-court decision must be "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," before habeas relief can be granted. 28 U.S.C. § 2254(d)(1) (2005). This Court has never decided the question of whether state courts are bound to apply *Teague* and state courts can find support in this Court's caselaw for the proposition that they are and are not so bound. It is highly unlikely, therefore, that a federal court sitting in judgment of a habeas petition can resolve this issue.

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[6] Indeed, the Minnesota court recognized that the *Teague* standard was based upon "different policy concerns" than those facing state-court judges reviewing state-court decisions, but nonetheless held that it was compelled to follow *Teague*. (App. A-6-7).

At least one state supreme court has already used its perceived power to amend the standard of retroactive application to afford greater protections to one of its citizens on this very issue – the retroactivity of *Crawford*. The New Mexico Supreme Court held that *Crawford* applied retroactively to a case that became final in 1987. *Forbes*, 119 P.3d at 147-49.[7] In the mid-1980s, the New Mexico court had agreed with the defendant, Ralph Earnest, that testimonial hearsay was inadmissible in criminal trials, only to be reversed by this Court. *Forbes*, 119 P.3d at 146. In *Forbes*, the New Mexico court held that *Crawford* did not announce a "new rule" when applied to the case before it. The court so held for equitable reasons:

> Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him to the same new trial he should have received back then.

Id. at 148-49; *see also Id.* at 146 ("It is beyond dispute that since *Crawford*, the rest of the nation knows now what the New Mexico Supreme Court announced in 1985").

The decision in *Forbes*, in which a state supreme court awarded retroactive application to a criminal defendant of a United States Supreme Court decision as a matter of equity, cannot be squared with the Minnesota Supreme Court's holding in this case: that state courts are not free to apply any retroactivity standard other than *Teague* to United States Supreme Court decisions. If the supreme courts of Minnesota, Oregon, and Montana are correct, and a state court has no authority to apply state retroactivity principles to Supreme Court decisions on federal constitutional rights, then the New

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[7] A petition for writ of certiorari in *Forbes* is pending before this Court. *See New Mexico v. Forbes*, U.S. Sup. Ct. File No. 05-644.

Mexico court's decision in *Forbes* is wrong. But if, on the other hand, state courts are "free to effectuate under their own law [broader retroactivity standards and to] apply those standards in a broader range of cases than is required by" *Teague*, *Johnson* 384 U.S. at 733, then the New Mexico court's decision in *Forbes* is justifiable, and the Minnesota Supreme Court's decision in this case is not. Either the New Mexico Supreme Court overstepped its bounds or the Minnesota Supreme Court unnecessarily constrained itself. This Court should accept certiorari over this case to determine which is correct.

The only way for the split of authority on this important issue to be resolved is for this Court to resolve it. This Court should accept certiorari over this case to resolve the split of lower-court authority on this important issue.

C. The question of whether state courts are bound to apply *Teague* is vitally important to every state court in the country.

The question of whether a state supreme court is bound to apply the *Teague* test is a vitally important question of federal law, the answer to which will affect every state court in the country. Each term, this Court issues numerous criminal-law decisions, each one potentially affecting innumerable criminal prosecutions in this country. State courts, in which the vast majority of such prosecutions are based, need to know by which decisions they are bound and, alternatively, how much power they have to provide greater protections to their citizens than the protections afforded by the federal constitution. This Court has always shown "[r]espect for the independence of state courts," and has recognized that "[i]t is fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions." *Long*, 463 U.S. at 1040-41. The Court should accept certiorari over this case to ensure that state courts are,

indeed, "free and unfettered" to apply this Court's decisions "in a broader range of cases than is required by" *Teague*. *Id.*; *Johnson*, 384 U.S. at 733. Right now, at least two states do not feel so free or so unfettered.

In addition, this Court should accept certiorari over this case to resolve any inconsistencies in its own caselaw. The state courts that have concluded that they are free to fashion their own retroactivity standards have relied on one line of cases from this Court; a line that includes *Johnson* and *Long* and stands for the proposition that state supreme courts are free to interpret their own constitutions in ways that give greater protections to their citizens than those afforded by the federal constitution. Other state supreme courts, including the Minnesota Supreme Court in this case, have relied upon a line of cases that include *American Trucking*, *Payne*, and *Hass*; cases that stand for the proposition that the retroactive effect of this Court's decisions involve only questions of federal law, not state law, and that state law does not apply.

If the latter were true, however, one would think that claim that an issue was *Teague*-barred would be nonwaivable. But this Court has repeatedly held that the *Teague* rule simply created a procedural defense that state governments might raise in a habeas proceeding that this defense was forfeited if the state did not raise it in a timely manner. *See Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (noting that state did not assert *Teague* as a defense in a timely manner); *Godinez v. Moran*, 509 U.S. 389, 397 n. 8 (1993) (same); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (holding that *Teague* rule is not "jurisdictional" and accepting state's waiver of any *Teague* issue). Only this Court

can resolve any inconsistencies between these two lines of cases, and it should do so by accepting certiorari over this case.

The Minnesota Supreme Court, and the other state supreme courts in the minority, have held that this Court's decisions have bound them to use the *Teague* standard when deciding whether to apply federal constitutional rules retroactively. But what happens if this Court holds that Congress can, or has, abrogated *Teague* altogether? In at least two cases this term, this Court is considering whether amendments to the federal habeas stature, 28 U.S.C. § 2254(d)(1) and (2), effectively abrogated the *Teague* standards. *See Wharton v. Bockting*, Sup. Ct. File No. 05-595; *Burton v. Stewart*, Sup. Ct. File No. 05-9222. If *Teague* is binding upon the states, and Congress can abrogate *Teague*, then can Congress prohibit state courts from applying United States Supreme Court decisions retroactively? Or, if Congress has abrogated *Teague*, has it already done so? The Court should grant certiorari over this case to answer these important questions.

Finally, this Court should grant certiorari in the interests of justice. This Court has granted certiorari in a number of cases to, in Justice Stevens' words, "make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution." *Washington v. Recuenco*, 126 S.Ct. 2546, 2554 (2006) (Stevens, J., dissenting) (citing *Brigham City*, 547 U.S. ___, 126 S.Ct. 1943 (2006); *Kansas v. Marsh*, 548 U.S. ___, 126 S.Ct. 2516 (2006)). The issue presented here dovetails with Justice Stevens' concerns. In this case the Minnesota Supreme Court held that it could not "grant[]

its citizens any greater protection than the bare minimum required by" *Teague*. *Recuenco*, 126 S.Ct. at 2554 (Stevens, J., dissenting); (App. A-6-7). This Court should make sure that state supreme courts know to what extent they are free to interpret their own constitutions to provide greater protections to their citizens.

The primary purpose behind *Teague* was "to limit the scope of federal habeas corpus review of state criminal convictions." *Id.* at *13. It was not "to achieve uniformity of results among the fifty states." *Id.*; *see also* Mary C. Hutton, Retroactivity in the States: The Impact of *Teague v. Lane* on State Postconviction Remedies, 44 Ala. L. Rev. 421, 449-58 (1993) (arguing that states should follow broader retroactively principles than those announced in *Teague*; describing notion that states are bound to follow *Teague* as "mistaken"). The *Teague* standard was not designed for state courts, and it was certainly not designed to bind state courts. The Court should grant the petition for writ of certiorari on this issue.

II.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE IF *CRAWFORD*'S HOLDING APPLIES TO PETITIONER'S CASE, THE IDENTICAL ISSUE PRESENTED IN THE PENDING CASE OF *WHORTON v. BOCKTING.*

The Minnesota Supreme Court affirmed petitioner's conviction because it held that *Crawford*, which was decided in 2004, did not apply to petitioner's case, which became final in September 1999. The Minnesota court considered the issue of *Crawford*'s retroactive application under the *Teague* standard and held that 1) *Crawford* had announced a new rule of constitutional criminal procedure; and 2) the rule was not a watershed rule. (App. A-7-14).

In 2004, a split panel of the United States Circuit Court of Appeals for the Ninth Circuit reached the opposite conclusion. *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2004), *op. amended, re'hrg en banc denied* 408 F.3d 1127 (9th Cir. 2005). Considering the same issue, a majority of the panel held that, even if *Crawford* had announced a new rule, it was a watershed rule of criminal procedure and was fully retroactive. *Bockting*, 399 F.3d at 1018. One of the panelists would have concluded that *Crawford* did not announce a new rule and therefore applied to all past cases. *Bockting*, 399 F.3d at 1022-24 (Noonan, J., concurring). Another panelist dissented and would have held that *Crawford* announced a new rule but not a watershed rule of procedure. *Id.* at 1024-41 (Wallace, J., dissenting).

This Court has issued a writ of certiorari in *Bockting*, presumably to determine (possibly among other things) *Crawford*'s retroactive effect under the *Teague* standard. *Whorton v. Bockting*, ___ U.S. ___, 126 S.Ct. 2017 (2006) (mem) (U.S. Supreme Court

File No. 05-595). Because Minnesota feels compelled to use the *Teague* standard to determine the retroactive effect of *Crawford* and this Court's other decisions, the decision in *Bockting* could control the outcome of petitioner's case. Only by granting this petition can the Court assure that petitioner will benefit from its ruling. As an alternative to granting the petition on the merits of the first issue presented, this Court should grant the petition and consider staying any further proceedings until it renders a decision in *Bockting*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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